The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FREEDOM FOUNDATION, a Washington State Nonprofit Corporation, Plaintiff, v. WASHINGTON DEPARTMENT OF ECOLOGY, a Washington State Agency; SANDI STEWART, in her official capacity as Director of Human Resources for the Washington Department of Ecology, Defendant.	No. 3:18-cv-05548 RBL WASHINGTON STATE DEPARTMENT OF ECOLOGY'S REPLY IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT **NOTE ON MOTION CALENDAR:** **October 25, 2019** **Oral Argument Requested**

I. INTRODUCTION

The undisputed material facts in this case show that Ecology's lobby is a nonpublic forum, governed by a reasonable policy that is very common amongst property owners: in order to be present and make use of the lobby, members of the public must have business to conduct in the building. In Ecology's Lacey headquarters, this means (1) having a meeting with an Ecology staff person or one of Ecology's tenants, (2) attending a public hearing or meeting in the building, or (3) attending an approved charitable activity. It is undisputed that Freedom Foundation's proposed activity (canvassing in Ecology's lobby to promote their organization's message) does not meet any of these exceptions to Ecology's general prohibition on visitors using the agency's facilities for nonbusiness related purposes.

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Freedom Foundation has never alleged, nor produced any evidence showing, that it had a meeting with Ecology staff, a public hearing to attend, or was invited to participate in an Ecology-approved charitable activity, and was denied access because of its message.

Instead, Freedom Foundation maintains that the First Amendment requires Ecology to allow the Foundation to use the agency's headquarters lobby for its own purposes because the message Freedom Foundation seeks to promote concerns "labor relations." No court, least of all the U.S. Supreme Court in *Janus v. AFSME*, 138 S. Ct. 2448 (2018), has articulated such a rule. The fact that Ecology's employees have chosen to unionize, and bargain for the ability to meet with their union representatives at their place of work, does not mean that Ecology is now required to allow any organization that wishes to promote a message concerning labor relations to use Ecology's facilities. Indeed, this is precisely the issue that the Supreme Court addressed in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983), in which it held that denying a rival union access to teacher mailboxes "may reasonably be considered a means of insuring labor-peace within the schools."

There is no meaningful difference between Freedom Foundation and other outside groups who might wish to canvass Ecology employees and inform them of issues germane to the agency's management of Washington State's natural resources. Neither form of expression is allowed in Ecology's lobby. Freedom Foundation's First Amendment claim fails as a matter of law, and as such, this Court should deny its motion for summary judgment, grant Ecology's, and dismiss this case.

II. STATEMENT OF FACTS

Ecology incorporates and relies on the Statement of Facts from its Response and Cross Motion for Summary Judgment. *See* Dkt. 30 at 2–16.

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III. ARGUMENT

A. The Undisputed Evidence Shows That Ecology's Headquarters Lobby Is a Nonpublic Forum

1. Ecology only uses the lobby for internal meetings or events for its employees

Ecology's use of its own lobby for internal, statutorily authorized events or meetings is not evidence of "purposeful designation for public use." *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (quoting *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 805 (1985)). "[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it." *Forbes*, 523 U.S. at 679 (internal citations and quotation marks omitted).

This is precisely how Ecology's policies operate. It is undisputed that all of the events and meetings cited by Freedom Foundation were internal events for Ecology staff—not events open to the public. Ecology has reserved access to the lobby for the agency's own use, but visitors can obtain permission to access the lobby if they have a meeting with Ecology staff, are attending a public hearing, or are participating in a charitable activity. *See* Dkt. 30 at 8–11. Ecology relies on the state Legislature, Office of Financial Management, and Executive Ethics Board to determine whether a visitor's presence in, or use of, Ecology facilities is legitimately related to agency business. *See* Dkt. 30 at 22; Nelson Decl. Ex. 17 at 2–3.[1]

Freedom Foundation attempts to imbue this simple concept with ambiguity, but the Supreme Court has had no trouble finding that restricting the use of government property to only those persons who have "legitimate business on the premises" is wholly consistent with the First Amendment. *See United States v. Grace*, 461 U.S. 171, 178 (1983) (citing *Adderley v. State of Fla.*, 385 U.S. 39, 47 (1966). The Foundation admits that Ecology "exercises some selectivity" in determining who may access its lobby and for what purpose, but maintains that

[1] This also applies to wellness activities, which the Executive Ethics Board has authorized as a permissible use of state resources under the state's Smart Health program. Blevins Decl. Ex. 27 at 30:20-31:15.

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the lobby is still a designated public forum because Ecology has opened the lobby "to a class of speakers." *See* Dkt. 39 at 3. The Foundation does not identify the "class of speakers" it believes are allowed to use Ecology's lobby for expressive purposes, but regardless, the argument fails because the "selective access" Ecology grants to its lobby "indicates the property is a nonpublic forum." *Forbes*, 523 U.S. at 679. Freedom Foundation has not provided any evidence demonstrating that Ecology has intentionally opened the lobby of its Lacey headquarters building for public discourse.

2. Ecology interprets and applies its policies consistently

Lacking any evidence that Ecology has designated its lobby as a space for public discourse or expression, Freedom Foundation next argues that Ecology's interpretation of its policies "impose[s] substantial ambiguity." Dkt. 39 at 3. The Foundation also cites to portions of a Rule 30(b)(6)[2] deposition transcript it claims is evidence that "speech expressly promoting an outside organization can be allowed under a variety of case-by-case circumstances despite the straightforward prohibition in Policy 14-10." *Id.* But this argument distorts both the questions that Freedom Foundation's counsel asked, and the answers Ecology gave during the deposition.

The deposition testimony that the Foundation relies on does not show that Ecology interprets its policies in a manner that grants permission to use the lobby to all visitors "as a matter of course," such that the lobby could be considered a designated public forum. *See Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 497 (9th Cir. 2015). In fact, the testimony is wholly consistent with the plain language of Policy 14-10, which does not allow promotion or solicitation by outside groups, except to the extent it occurs in the context of Ecology-related business.

[2] Ecology's representative answered questions regarding the agency's "interpretation and enforcement, since the beginning of 2015, of Administrative Policy 14-10…with respect to visitor activity on the premises of the Department of Ecology's Lacey Headquarters…." Nelson Decl. Ex. 7 at 2 (Revised Notice of Rule 30(b)(6) Deposition of the Washington Department of Ecology).

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For example, Ecology's representative explained the following regarding Policy 14-10: (1) he would consult with Ecology's Human Resources Director, Sandi Stewart, to determine whether an activity was permissible (Blevins Decl. Ex. 9 at 18:2–5); (2) he would expect most conversations in Ecology's building to concern Ecology-related business (*Id.* at 19:3–8); (3) one of the reasons Ecology does not allow promotion and solicitation in the lobby is because it can encourage conversations that can be disruptive to staff due to the acoustics of the lobby (*Id.* at 26:10–19); (4) Ecology considers holding a sign to be an active activity, while wearing a pin or t-shirt is more passive (*Id.* at 32:19–25); and (5) Ecology officials have discretion to determine whether allowing Intercity Transit to participate in an internal Ecology event is sufficiently related to Ecology business to be permissible under Policy 14-10 (*Id.* at 38:22–39:7).

The remaining portions of the deposition cited by Freedom Foundation consist of a series of increasingly attenuated hypothetical questions that are not material to the issue of whether Ecology's lobby is a public forum. At one point, counsel for the Foundation asked what Ecology would do if "a single member of the public who is not representing any other organization entered Ecology premises and was in the lobby talking about an issue unrelated to Ecology business[.]" Blevins Decl. Ex 9 at 21:5–8. Ecology's representative stated, "it would be dependent upon the content of that conversation," because Policy 14-10 would not allow "somebody who wanted to come in and is a single member of the public and promote a business or solicit for a business that they own, operate, or are a part of…." *Id.* at 21:12–19. Freedom Foundation's counsel also asked if it would be a violation of Policy 14-10 if a visitor "sat down in the lobby area [wearing a pin that said Save Our Salmon with a Columbia Riverkeepers logo]…." *Id.* at 24:14–16. Ecology responded:

> It could be. I think we would have to understand their intent for being in the building and being in the lobby . . . If they were there to speak business with Ecology staff and they were wearing the pin, I think that's different than somebody who is there and perhaps would want to draw attention to that pin through their presence in the building.

Blevins Declaration, Exhibit 9 at 21:5–8. Neither of these examples are evidence of inconsistent policy interpretation or application.

Finally, the Foundation's assertion that the lobby is a public forum because Ecology allowed its former cafeteria vendor to conduct a coffee taste test in the cafeteria is both incorrect, and immaterial to its claims regarding the lobby. The cafeteria vendor had a contractual right to use the cafeteria space for the commercial purpose of selling food and beverages to Ecology staff and the public, which is why Sandi Stewart directed the vendor to hold the taste test in that space, rather than in the lobby. *See* Dkt. 30 at 11–12. This is not evidence that Ecology intended to open its lobby as a public forum, and Freedom Foundation has failed, as a matter of law, to show otherwise.[3]

B. Even If Ecology's Policies Were Content Based, They Are Permissible Because the Lobby Is a Nonpublic Forum

Freedom Foundation misrepresents Ecology's argument regarding whether its policies are content based as a matter of law. Ecology's argument in its Cross Motion does not contradict its designated representative's Rule 30(b)(6) deposition testimony regarding Policy 14-10. The answers he gave reflect the plain terms of Ecology's policies, which require a visitor to have business to conduct with the agency in order to be present in the building. Blevins Decl. Ex. 9 at 21:5–19, 24:14–25:1. Understanding whether a visitor is present to promote their own business or organization, or to meet with Ecology staff, necessarily requires some basic information from the visitor regarding their intentions, even under Freedom Foundation's unlikely hypothetical scenario in which a visitor walks into Ecology's lobby and begins "talking about an issue unrelated to Ecology business" to no one in particular. *See* Blevins Decl. Ex 9 at 21:5–8.

[3] Freedom Foundation continues to rely on the statements of Ecology's contracted security guard as evidence of Ecology's policy interpretation and enforcement. *See* Dkt. 39 at 2, 4. It is undisputed that Mr. Nasworthy is not authorized to speak on behalf of Ecology. Moreover, to the extent Ecology is even required to "rebut" the stray, unsubstantiated remarks of a contracted security guard, it has done so several times. *See* Dkt. 30 at 12, 14–16.

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In its Cross Motion, Ecology disagreed with Freedom Foundation's expansive reading of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and pointed out language in that opinion and other Supreme Court cases that indicate Ecology's policies should be considered content-neutral. *See* Dkt. 30 at 24–25. But even if the Court finds that applying Ecology's policies requires some consideration of content, this consideration is permissible because Ecology's lobby is a nonpublic forum. *See Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."). Thus, Freedom Foundation's contention that Ecology's lobby is a public forum because its policies involve some consideration of content fails.

C. Ecology's Compliance with the State Collective Bargaining Agreement Is Not Evidence of Viewpoint Discrimination

Unable to distinguish themselves from other outside groups who wish to engage in expressive activity on Ecology's property (such as Sierra Club), Freedom Foundation resorts to arguments that the Supreme Court settled years ago in *Perry*.

First, the Foundation argues that Sandi Stewart's Rule 30(b)(6) testimony agreeing with counsel's question that "the union is the only organization that can speak to union related issues on Ecology premises under [section 5, subsection B of Executive Policy 15-01]" is evidence of viewpoint discrimination. *See* Dkt. 39 at 7; Blevins Decl. Ex. 27 at 17:17–22. But this statement simply confirms the undisputed fact that the state CBA authorizes the Washington Federation of State Employees (WFSE), and no other group, to use state resources for representational activities[4] without violating state ethics laws. *See* Nelson Decl. Ex. 22 at 17–18, Ex. 3 at 51:4–12. The Foundation does not dispute that the Washington State

[4] The Foundation cites to a meeting between Ecology employees and WFSE on the day that the Supreme Court issued its opinion in *Janus v. AFSCME* as evidence that "union representatives are not limited solely to representational activities when on Ecology premises." Dkt. 39 at 9. The cited meeting, which did not occur in the lobby, is irrelevant to the question of whether Ecology's lobby is a nonpublic forum. Regardless, discussing the outcome of a precedent-setting Supreme Court case concerning public-sector employees' obligation to pay union dues certainly qualifies as "representational activities."

Federation of Employees (WFSE) is the exclusive bargaining representative for Ecology's represented employees.

Second, the Foundation tries to stretch Ms. Stewart's statement into an admission that Ecology prohibits "all speech relating to labor relations except for the union's view" on its property. *See* Dkt. 39 at 8. However, Ecology's rejected offer of allowing the Foundation to canvass in the plaza in front of the lobby (still on Ecology property, just not in the Foundation's preferred location) directly refutes this allegation. This is precisely the sort of "differential access" that the Supreme Court approved of in *Perry*, 460 U.S. at 50–51. Like the teacher's union in *Perry*, WFSE has the right to meet with bargaining unit employees in Ecology's lobby by virtue of its status as the exclusive bargaining representative for Ecology's represented employees. Freedom Foundation can communicate their views on labor relations in the plaza in front of Ecology's building, or on Desmond Drive, as they did in 2017. This distinction, based on "the *status* of the respective unions rather than their views," is not evidence of viewpoint discrimination. *See Perry*, 460 U.S. at 49.

Third, Freedom Foundation claims Ecology's decision to revise Policy 14-10 in the wake of the Foundation's 2015 visit to Ecology headquarters is "direct evidence" of viewpoint discrimination. *See* Dkt. 39 at 9–10. However, the Foundation does not dispute that its Santa-costumed canvasser, Elmer Callahan, entered a nonpublic employee work area during that visit, and had to be escorted back to the lobby by Ecology staff. *See* Dkt. 30 at 13–14. The Foundation also does not dispute that during this visit, Ken Nasworthy mistakenly thought the Foundation canvassers were members of WFSE, or that Foundation staff attorney David Dewhirst argued with Mr. Nasworthy and Sandi Stewart after he was told that canvassing was only allowed outside of Ecology's building. *Id.*

Freedom Foundation is correct that after the above events, Ecology recognized a need to review and update its own policies to avoid similarly confusing or confrontational situations in the future. *See* Dkt. 30 at 8. But the Foundation fails to put forth any evidence,

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other than a re-hashing of its designated public forum arguments, to demonstrate that this policy revision was motivated by discriminatory animus towards Freedom Foundation.

The other evidence that the Foundation cites does not support its claim that "Ecology has engaged in uniquely discriminatory enforcement" of its policies against Freedom Foundation. Dkt. 39 at 9. The Foundation argues that the state Commute Trip Reduction program does not allow Ecology to invite Intercity Transit or Joy Ride Bikes to participate in internal informational events for Ecology employees. Dkt. 39 at 9–10. However, state law expressly contradicts this claim. *See* Wash. Rev. Code § 70.94.531(3)(b) ("A commute trip reduction program of a major employer shall consist of, at minimum…regular distribution of information to employees regarding alternatives to single-occupant vehicle commuting[.]"). Collaborating with a regional transit authority and local bike shop to inform its employees about commuting alternatives is not evidence that Ecology has discriminated against Freedom Foundation.[5]

Finally, Freedom Foundation seeks to expand *Janus*, arguing that the decision requires government employers to open their property to groups like the Foundation, simply by virtue of the fact that their employees have chosen to unionize. *See* Dkt. 9. *Janus* is plainly inapplicable here. That case held that public-sector agency-shop arrangements, in which public-sector unions charge nonmembers a proportionate share of union dues for the union's work as the collective bargaining representative, are unconstitutional under the First Amendment. *See Janus*, 138 S. Ct. at 2477-78.

No part of *Janus* stands for the proposition that the mere presence of a union in a government building requires an employer to turn their property into a public forum. Ecology certainly has no obligation to allow the Sierra Club use its lobby for expressive activity simply

[5] The Foundation also cites to the enabling provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 151, as evidence that "outside organizations should likewise be able to educate employees on Ecology premises about self-organization and freedom of association." *See* Dkt. 39 at 10. Notwithstanding Freedom Foundation's apparent expansion of its First Amendment claim to include "Ecology premises" rather than just Ecology's headquarters lobby, the NLRA does not apply to state agency employers. 29 U.S.C. § 152(2).

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because Ecology's thematic focus is environmental issues. It defies logic, and Supreme Court precedent, to argue that Freedom Foundation is entitled to such preferential treatment. The Court should find that Freedom Foundation has failed as a matter of law to establish that Ecology has engaged in viewpoint discrimination.

D. State Law Prohibits the Private Use of State Resources by Anyone, Regardless of Whether They Are an Ecology Employee

Freedom Foundation's arguments about Ecology's Executive Policy 15-01 lend no support to their claims of viewpoint discrimination. Ecology does not dispute that Policy 15-01 only applies to Ecology employees. Nelson Decl. Ex. 12 at 7:22–24. Ecology employees are prohibited from using state resources to support, promote, or solicit "for an outside organization or group, unless allowed by law and authorized by Ecology's director or designee." Nelson Decl. Ex. 8 at 2. Sandi Stewart explained that the prohibition in Policy 15-01 prevents employees, like herself, from allowing non-employees to use state resources. Declaration of Emily C. Nelson in Support of Ecology's Reply Ex. 29 at 49:24–50:10. While the non-employee would not technically be in violation of the Policy, Ms. Stewart would. *Id.* Regardless of who violates the policy, the result is the same: an outside organization is not allowed to make private use of Ecology's facilities.

It is reasonable for Ecology to interpret Policy 15-01 in a manner that ensures no one, whether or not they are an employee, misuses the state resources under the agency's control. Freedom Foundation claims that this is post hoc rationalization, but it does not dispute that this policy has been in place since the 1990s, and has been incorporated by reference into Policy 14-10 for at least that long. *See* Dkt. 30 at 5–6, 8. Again, the Foundation fails to identify any evidence of viewpoint discrimination.

E. The Plaza in Front of Ecology's Building and Desmond Drive Are Adequate Channels for Freedom Foundation to Communicate Its Message

Finally, Freedom Foundation contends that in order for the plaza in front of Ecology's building and Desmond Drive to be adequate alternatives to the lobby, Ecology must show that

employees "frequently" walk through the plaza or along Desmond Drive. *See* Dkt. 39 at 15. Even though the Foundation does not dispute that one of its 2017 canvassers stood on Desmond Drive dressed as Santa, holding a poster and greeting employees as they arrived, it now claims that Desmond Drive is not adequate for handing out fliers, and therefore is inadequate as a matter of law. *Id.* As with their other arguments, Freedom Foundation's contentions fail.

Freedom Foundation's canvassing methods do not dictate the time, place, or manner restrictions Ecology can establish for its lobby. *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). Moreover, Ecology is not required to provide an alternative channel of communication on its own property. *See Greer v. Spock*, 424 U.S. 828, 839 (1976) (political candidates not permitted to campaign on military base; allowing service members to attend political rallies off-base was an adequate alternative); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (prisoners limited to in-person visits with family, lawyer, or clergy; allowing communication with members of the media by mail was an adequate alternative). It is undisputed that in addition to canvassing on Desmond Drive or in front of Ecology's building, the Foundation also sends canvassers to speak with state employees in their homes. Hayward Declaration ¶ 9. These alternative channels of communication exceed what the Supreme Court has held to be acceptable, and are adequate as a matter of law.

IV. CONCLUSION

The undisputed evidence shows that Ecology's lobby is a nonpublic forum, and the agency's regulation of that forum is reasonable. The Court should deny Freedom Foundation's motion for summary judgment, grant summary judgment to Ecology, and dismiss this case with prejudice.

DATED this 21st day of October 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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